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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

GROSSMONT UNION HIGH SCHOOL DISTRICT,

Petitioner,

v.

THOMAS DAVIES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual may waive his or her right to seek and hold elective office on a specific local public school board, or whether such a waiver is void under all circumstances as against public policy.

2. Whether a federal district court order containing a written waiver of a litigant's right to seek and hold elective office on a specific local school board is void even though such waiver is clear, voluntary and given as part of a judicially supervised settlement of civil litigation, and where the litigant receives a substantial monetary benefit in exchange for the waiver.

PARTIES TO THE PROCEEDINGS BELOW

Thomas Davies, respondent herein, and Nadia Davies, his wife, filed the action.

The Grossmont Union High School District ("school district"), petitioner herein, was a defendant in the action. Also named as defendants were Monte Vista High School, a school of the school district, and Jennifer Eliot, Robert Pyle, Paul Martin, Christopher Bogden and Gerald Gordinier, all former or current school district administrators or employees. Fictitious defendants were also named.

Thomas Davies alone appealed the judgment of the district court to the court of appeals. All parties named as defendants in the trial court were appellees before the court of appeals.

The school district alone petitions this Honorable Court.

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No. _____

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THOMAS DAVIES,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Grossmont Union High School District, a California public school district, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals which is the subject of this petition (App. B, *infra*) was filed and entered as the judgment of the appellate court on February 11, 1991; it is not reported. It stated that a "full opinion" would follow, and such opinion (App. A, *infra*) was filed April 8, 1991; the court of appeals ordered the opinion published, though it has not yet been officially reported (9th Cir. Case No. 91-55140).

The judgment of the district court, entered December 19, 1990 (App. C, *infra*) is not reported (S.D. Cal. Case No. 88-0337-JLI(M)).

JURISDICTION

The order of the court of appeals was entered February 11, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (Supp. 1990).

PROVISION OF LAW INVOLVED

The underlying action was based upon the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1981), though interpretation of that statute is not in question. Section 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Respondent's spouse was an employee of petitioner. Commencing in 1987 respondent and respondent's spouse filed several administrative agency complaints and lawsuits against petitioner, including this proceeding. Though this action was filed in the Superior Court of the State of California, defendants removed the action to the United States District Court for the Southern District of California on the basis that the complaint included a federal claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1981). The district court later remanded to the state court the pendent state law claims, including respondent's loss of consortium claim, his only claim. All parties, including respondent, thereafter participated in settlement negotiations and in settlement discussions before a magistrate of the federal district court.

In a judicially supervised settlement agreement of all the civil litigation between the parties, including respondent's claim, respondent and respondent's spouse agreed that they would never "seek, apply for, or accept future

employment, position, or office with Defendant District in any capacity." Respondent's wife also resigned her employment with petitioner as part of the agreement. They also agreed that they would "enter on the real property of any of defendant District's school sites only at the discretion of the site principal." These promises were contained in a comprehensive stipulation and settlement agreement which was confirmed and incorporated into an order of the federal district court, entered April 11, 1989. Petitioner's primary reasons for the settlement were the complete separation of the litigants, the covenants referred to above and the end of costly and acrimonious litigation which had a disruptive impact on school operations. Respondent and his wife received the sum of $39,200.00 in exchange for their promises and covenants, and respondent's wife also received other consideration with respect to benefits and future employment references.

In November of 1990 respondent ran for and was elected to the school board of petitioner in violation of the district court's order. Immediately after the election petitioner sought to enforce the settlement agreement and the order of the district court. On December 19, 1990, the district court entered its Memorandum, Decision and Order (App. C, *infra*) which required respondent to resign from petitioner's school board. The district court found that respondent had clearly and voluntarily waived his right to seek an office on the school board and that the office had been obtained in willful violation of court order. The court further found that its power and interest in enforcing its order was not outweighed by the public

policy of enforcing a term of office. Respondent also was ordered to pay petitioner's attorneys' fees and costs.

Respondent filed his notice of appeal from the district court order on January 11, 1991. He also sought a stay pending appeal from the trial court (which was denied) and from the Ninth Circuit. Instead, the court of appeals ordered the appeal expedited and heard oral argument on the merits of the appeal on February 5, 1991.

The Ninth Circuit order was filed and entered February 11, 1991 (App. B, *infra*). The order vacated the district court's contempt order and declared that respondent's resignation from the school board, ordered by the trial court, shall have no force or effect. The order stated that a "full opinion" would follow, and such opinion (App. A, *infra*) was filed April 8, 1991. That opinion confirmed the prior order and also vacated the trial court order that respondent pay petitioner's attorneys' fees.

EXISTENCE OF JURISDICTION BELOW

The district court had jurisdiction over the federal civil rights claim under 28 U.S.C. § 1343(a)(3) (Supp. 1990). The district court also had jurisdiction over the state law pendent claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The district court had the power and jurisdiction to remedy willful failures to obey its orders under its inherent power. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT IGNORED IMPORTANT PUBLIC POLICY REASONS TO ENFORCE THE AGREEMENT AND THE COURT ORDER

The district court enforced its order, and the term of the settlement agreement between the parties, that respondent may not seek or hold any position with petitioner Grossmont Union High School District (hereinafter referred to as "petitioner" or "the school district"). Invoking the decision of this Court in the case of *Town of Newton v. Rumery*, 480 U.S. 386 (1987),[1] the court of appeals invalidated that provision of the agreement and the contempt order of the district court.

But, the court of appeals has subverted the holdings of *Rumery* with a result that undermines the public policies providing that persons should follow, not ignore, court orders and encouraging both the settlement of civil disputes and the preservation of precious public funds. At the same time the appellate court has combined the principles that protect the public's right to vote with a person's right to run for office to such an extreme that the electorate in general now, according to the court of appeals, has a fundamental right to vote for one particular person for a specific local office. The decision, as discussed below, raises these important questions of federal law which must be addressed by this Honorable Court.

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[1] Neither the application nor the interpretation of *Rumery* was briefed by the parties. The appellate court gave notice the day before oral argument that it wished counsel to address *Rumery* at argument.

In *Rumery* this Court considered the validity of a "release-dismissal agreement" between a criminal defendant and the prosecutor that provided that the criminal complaint would be dismissed in return for the defendant's covenant not to sue town law enforcement authorities for violation of his federal civil rights in connection with his arrest and prosecution. Since the agreement purported to waive the right to sue under federal law, the Court found that the validity of the agreement was a question of federal law. 480 U.S. at 392. Rejecting the holding of the court of appeals that such agreements were invalid *per se* (*id.* at 397), the Court articulated a test which provided that one balances, on a case-by-case basis, the public interests in enforcing the agreement versus those militating against enforcement. *Id.* at 392. Finding that the release-dismissal agreement executed by Rumery did not adversely affect relevant public interests, that the agreement was voluntary and that there was no evidence of prosecutorial misconduct, the Court upheld the validity of the agreement. *Id.* at 398.

It could be argued at the outset that *Rumery* does not apply. The release-dismissal agreement involved in that case was an extra-judicial agreement between the defendant and the prosecutor. Rumery signed the agreement and the prosecutor dropped the criminal charges. 480 U.S. at 390-91. Unlike plea agreements, such release-dismissal agreements are not "subject to judicial oversight." *Id.* at 393, fn. 3.

Here, of course, the settlement agreement was subjected to intense judicial scrutiny, both by a federal magistrate who met with the parties and counsel several times to mediate the settlement and by the federal district

court judge who approved the agreement. Perhaps more significantly, the agreement was embodied in an order of the district court which, in no uncertain terms, required all parties to comply as specified, and constituted a final judgment of all claims. Included among the terms was the provision precluding respondent from holding any position with the school district.

Respondent never appealed that judgment, nor did he ever seek modification of its terms. *See*, Fed. R. Civ. P. 60. The order on the agreement had been entered April 11, 1989 (App. C, *infra*, C-1) when respondent did not even live in the school district. He had ample opportunity to seek modification of the order *before* he ran for election to petitioner's school board in November 1990. Rather, he chose to unilaterally disregard the district court's order. By reason of the existence of a court order (rather than merely an extra-judicial contract), and respondent's willful disobeyance of that order, *Rumery* does not apply here and the judgment of the court of appeals based on it must be reversed.

Nonetheless, since the court of appeals applied *Rumery*,[2] it is important to address the flaws of the appellate court's reasoning.

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[2] The suggestion by the Ninth Circuit that *Rumery* might not apply since that case involved only "the surrender of a *statutory remedy*" (App. A, *infra*, A-17, emphasis in original) is absurd. The remedy at issue in *Rumery* was relief under Section 1983 for violation of *constitutional* rights.

A. The Court Of Appeals Did Not Even Acknowledge The Policy Favoring Obedience To Court Orders.

This Court in *Rumery* balanced the relative public policies at stake. Paying mere "lip service" to the *Rumery* analysis, the court of appeals identified the policies favoring enforcement of the agreement only grudgingly, and pejoratively (App. A, *infra*, A-20-A-23). Even still, the appellate court failed to identify the importance of complying with court orders and judgments as a public policy of any significance, important or otherwise.

With regard to the power of the courts to enforce their decrees, and the importance of that duty, this Court has stated:

> "[T]here could be *no more important duty* than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while [the power of contempt] is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is *absolutely essential* to the performance of the duties imposed on them by law."

Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911), emphasis added. *See also, Young v. United States ex rel. Vuitton et Fils S.A., supra*, 481 U.S. at 796.

Though the mere existence of a court order does not itself justify blind enforcement, the extremely strong public policy underlying the obedience to court decree remains ever present. The court of appeals made no allowance for such policy and that failure alone so skews

its public policy analysis that it renders it invalid. Apparently, the Ninth Circuit discounts the importance of complying with judicial orders, and has instead rewarded a civil litigant who willfully disobeyed a federal court order and who never appealed or sought modification of that order. The published opinion provides dangerous guidance to those whose paths follow the parties in this case.

B. The Appellate Court Discounted The Policy Favoring Settlement Of Litigation Against Public Agencies.

The court of appeals did acknowledge the "policy favoring enforcement of private agreements and the encouragement of settling litigation" (App. A, *infra*, A-20). But, it failed to recognize the critical importance of settlement in this case, particularly since it involved extensive litigation against a public agency.

Though the general policy favoring settlement of litigation and enforcement of private agreements cannot be minimized, the importance of the settlement of litigation against governmental bodies cannot be overemphasized. With respect to civil rights actions under Section 1983, the Court in *Rumery* stated as follows:

> The vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by § 1983 suits. No one suggests that all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is

> *substantial.* Counsel may be retained by the official, as well as the governmental entity. Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties. In some cases litigation will extend over a period of years. *This diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest.* To the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims, they further this *important public interest.*

480 U.S. at 395-96, emphasis added. In her concurring opinion in *Rumery*, Justice O'Connor stated, "Certainly some § 1983 litigation is meritless, and the inconvenience and distraction of public officials caused by such suits is not inconsiderable." *Id.* at 399.

Here, the school district is obviously a local governmental agency, with all the commonly-recognized fiscal difficulties attendant to public school district operations. The record is clear that respondent and his wife initiated numerous administrative and judicial proceedings, including this one, which consumed massive amounts of time and resources of petitioner and its educational and administrative staff, let alone the funds for retained counsel in each proceeding. The resulting diversion of teachers and administrators from their public mission – the education of children – was overwhelmingly disruptive and destructive. The devotion of public money to legal proceedings, rather than to the educational process, constituted an interference of high public importance. Settlement of that acrimonious relationship, and enforcement of resulting agreements and orders, cannot be

termed anything less than the "important public interest" referred to in *Rumery*. 480 U.S. at 396.

In furtherance of that interest, the governing board of the school district resolved to end the underlying litigation, and all related administrative proceedings, to stop the drain on its resources and to allow its staff to get back full-time to the business of educating school children. The agreement was negotiated "arms-length," with counsel on both sides and with the frequent assistance of a United States Magistrate. Respondent and his wife voluntarily agreed to the mutually negotiated terms. The agreement was designed to settle all matters between the parties, and it did. The settlement agreement, and the resulting court order, halted all litigation and proceedings between the parties, until respondent violated the court order.

The court of appeals ignored all that and apparently saw no value in the policy determination of petitioner's governing board that settlement, including a complete separation of the parties, was in the best interest of the school district. Certainly, the system of government requires, as an element of fundamental democracy, at least some deference to the policy judgments of the executive, in this case the members of the school district's governing board having been elected by the public whose interests they serve. The appellate court barely indulged petitioner's presentation of the rational bases for enforcing the subject order and agreement.

Rather than recognizing the importance of the public policy of settlement or the practical benefit of its implementation here, or deferring in even small measure to petitioner's judgment as to the need for the settlement,

the Ninth Circuit chose to see villains where none exist – and without any support in the record. In somehow concluding that the members of petitioner's governing board extracted the subject provision from respondent to eliminate a political opponent (App. A, *infra*, A-21), the court of appeals went far beyond the record, or any reasonable inference drawn from the record.

In fact, respondent did not even live in the district at the time of the litigation on the settlement (a fact admitted by the court of appeals, though apparently not appreciated), respondent admitted to the trial court that at the time of the settlement he had no thought of running for the school board and there is no suggestion anywhere in the record that the governing board wished to silence respondent. In fact, petitioner sought to end the legal battles and to provide complete separation, including that respondent and his wife may not hold position or office with respondent, and could not even enter petitioner's premises without permission.

The appellate panel's interpretation of those facts as "pernicious" (App. A, *infra*, A-21), without *any* support in the record, may reveal an assumption by the court of appeals of governmental misconduct.[3] The courts may make no such assumptions. *Rumery*, 480 U.S. at 395. It also ignores the role of the trial court in assisting the parties in the crafting of the settlement agreement and in

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[3] To equate petitioner's intent with the *illegal* purchase of a vote (App. A, *infra*, A-22) may reveal even more sinister assumptions.

protecting not only the parties, but the public interest as well.[4]

Indeed, if anyone is guilty of "pernicious" behavior, it was respondent. He knowingly violated the order of the district court and he attempted to defeat the court's jurisdiction by having the oath of office administered by an official from another school district (App. C, *infra*, C-4).

Neither is there a lack of a "close nexus" between the underlying litigation and the subject settlement term, as stated by the Ninth Circuit (App. A, *infra*, A-24). Respondent and his wife pursued their litigation jointly. Respondent in fact was the first-named plaintiff in this action (App. C, *infra*, C-1).[5] He also, of course, signed the settlement agreement and benefitted from the consideration received (App. A, *infra*, C-2). The terms of the agreement completely separating the parties were reasonably related to the underlying disputes and the courts should not substitute their judgment for the arms-length negotiated terms of the parties.

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[4] Justice O'Connor in her concurring opinion in *Rumery* identified the involvement of the court in the waiver as a factor mitigating against any theoretical abuse and in favor of enforcement of the agreement in that case. 480 U.S. at 402.

[5] The court of appeals states that respondent "erroneously remained a named plaintiff" after his claim was remanded to state court (App. A, *infra*, A-6). Rather, respondent submitted himself to the jurisdiction of the district court for the purposes of the settlement, and the resulting order, and pursuant to the agreement and order, dismissed his remanded state law claim (App. C, *infra*, C-2).

In ignoring the policy favoring obedience to court decrees, and in seriously understating the policies encouraging the settlement of litigation involving government operations, the Ninth Circuit has put forth flawed guidance that can only undermine those important principles. For those reasons alone, this Court must act by granting this petition.

II. THE APPELLATE OPINION DISTORTS THE DECISIONS OF THIS COURT AND CREATES A FUNDAMENTAL RIGHT OF AN INDIVIDUAL TO RUN FOR A SPECIFIC POLITICAL OFFICE

As flawed as the Ninth Circuit's analysis of the policies favoring enforcement is, its identification of the countervailing interest is even more damaging. In two paragraphs (App. A, *infra*, A-18-A-20), the court elevates a voluntary, court-supervised waiver by respondent of his statutory right to run for an office of the school district into a case implicating the *fundamental* political rights of candidates *and* voters generally. Invoking precedents of this Court, the appellate court, without explanation, concluded that the restriction on respondent's right to run for the school board "results in a limitation on the fundamental right to vote of every resident of Grossmont Union High School District" (App. A, *infra*, A-19).

In reality, such cases cited by the court, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (filing requirements for independent candidates), *Lubin v. Panish*, 415 U.S. 709 (1974) (fees for indigent candidates) and *Bullock v. Carter*, 405 U.S. 134 (1972) (unreasonable fee requirements), *all* pertain to electoral process requirements of *general* application. *None* concern any regulation, agreement or court

order implicating only the candidacy of a particular individual.

In this case *no* general disqualification is involved. The provision in question applies only to one office. It does *not* involve school board seats anywhere except in a single school district. It does *not* purport to restrict respondent from running for any other office, from school board member in a neighboring district to sheriff to governor. It also does *not* prevent respondent himself from voting in petitioner's school board elections (so long as he lives in the district).

Further, it affects no candidate other than respondent (and his wife). *Anyone* else can run for and hold one of petitioner's school board seats, as long as he or she complies with California's general law pertaining to the qualification of school board candidates. The provision would not even prevent someone who holds political and educational views identical to those of respondent from seeking and holding a school board seat.

This Court has never recognized candidacy as a "fundamental right." *Clements v. Fashing*, 457 U.S. 957, 963 (1982). From the voters perspective, it has been stated, "[N]o one is guaranteed the right to vote for a specific individual." *Zielasko v. State of Ohio*, 873 F.2d 957, 961 (6th Cir. 1989). Further, where the restriction in question imposes no burdens on a particular *classification* of persons with respect to ballot access, any distinction usually "need only be drawn in such a manner as to bear some rational relationship to a legitimate state end" under

traditional equal protection principles. *Clements*, 457 U.S. at 963.[6]

Respondent had no fundamental right to run for a school board seat and the restriction, to which he *voluntarily* agreed, did *not* affect the fundamental rights of the electorate. Neither did it place any burdens on *any* classification of persons. Validity need only be measured against a standard of rationality. The public interest in non-enforcement hardly "is of critical importance," as the Ninth Circuit has termed it (App. A, *infra*, A-20), certainly when measured against the significant public interests, discussed above, supporting enforcement.

The public interest identified by the court of appeals as preventing enforcement of the agreement by overriding the countervailing public interests does not exist in the inflated form viewed by that court. A proper balancing analysis under *Rumery* clearly tips in favor of enforcement.

III. CONCLUSION

In *Rumery* this Court stated, "We think the court [of appeals] overstated the perceived problems and also failed to credit the significant public interests that such agreements can further." 480 U.S. at 392. So too here has

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[6] Even a condition of probation in an election law prosecution case which restricts a person from running for office need only be tested against a reasonable relationship standard. *See e.g., United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979). Such a matter hardly involves the situation here of a term negotiated arms-length with court assistance.

the Ninth Circuit. It has ignored the public interest in having persons obey court orders and it has denigrated and discounted the important interest in settling litigation against public agencies. At the same time, the appellate court has created a fundamental right where none existed before.

The court's decision constitutes unwise judicial guidance. The important questions raised by the decision must be addressed and corrected by this Court. Petitioner respectfully prays that this Honorable Court grant its petition for a writ of certiorari.

DATED: May 8, 1991

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS DAVIES, *Plaintiff-Appellant,* v. GROSSMONT UNION HIGH SCHOOL DISTRICT; MONTE VISTA HIGH SCHOOL; JENNIFER ELIOTT; ROBERT PYLE; PAUL MARTIN; CHRISTOPHER BOGDEN; GERALD GORDINIER; and DOES 1 through 20, inclusive, *Defendants-Appellees.*	No. 91-55140 D.C. No. 88-0337-JLI(M) OPINION

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge,
and Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted
February 5, 1991 – Pasadena, California

Filed April 8, 1991

Before: James R. Browning, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Contracts

Reversing and vacating a district court contempt order, the court of appeals held that a provision in a

settlement agreement barring an individual from seeking any office in any capacity in a school district, including elective office, was void as against public policy.

Appellant Thomas Davies sought reversal of a district court order finding him in contempt of an order dismissing his previous action against the Grossmont Union High School District in accordance with a settlement agreement, and ordering him to resign immediately from elected office. Davies had executed the agreement with the school district to settle an action against it in connection with the district's transfer of Mrs. Davies, who had been employed as a teacher in the district. The agreement prohibited the Davieses from ever seeking, applying for, or accepting future employment, position, or office with the school district in any capacity. The district court approved the settlement agreement. Subsequently, Thomas Davies was elected to the school board. After the election, but before he was sworn in to office, the district sought to enforce the settlement agreement, seeking a contempt order. The district court ordered Davies to resign his office immediately and to pay attorneys' fees to the district. Davies appealed.

[1] Because district courts have power to enforce their own orders and to adjudge anyone in civil contempt who wilfully violates them, the district court had jurisdiction over this case. [2] The appellate court had jurisdiction because the district court's post-judgment contempt order was a final order of that court. The appellate court was not deprived of jurisdiction because Davies resigned his office. Although, ordinarily, compliance with a contempt order renders an appeal moot because the appellate court is left with no remedy to afford the appellant,

where compliance does not prevent the fashioning of adequate relief, a live controversy exists and the appeal is not moot. [3] Here, the contempt order had prospective effects and was for that reason as well subject to challenge on appeal.

[4] However, the court was not persuaded by Davies' arguments that the settlement agreement should not bar his election because its terms did not apply to elective office, and he did not knowingly waive his constitutional right to run for office. [5] The language of the settlement provision was clear. That the prohibition of "any office" included elective office was a proposition that required no further explication. [6] Likewise, Davies' argument that he did not knowingly waive his constitutional rights was without merit. The court could not accept Davies' contention that he thought the prohibition meant "seek or accept any office but elective office." It is possible to knowingly waive a general right without contemplating the specific circumstances under which that waiver will be enforced.

[7] To establish a waiver or estopped [sic] by the district of its right to enforce the settlement agreement by its failure to object to the public announcement of Davies' candidacy, Davies had to show either that the district made a clear expression of its intent to waive the right, or that he had carried his burden of establishing that the district's conduct warranted the inference that it relinquished that right. [8] Here, however, the district court neither conducted a hearing nor made factual findings with respect to either waiver of estoppel. Thus, the court was unable to conclude on the basis of the current record

that the district waived its right to enforce the agreement or that the district should be estopped.

[9] Nonetheless, the Ninth Circuit agreed with Davies' contention that enforcement of the settlement agreement was against public policy because it violated his constitutional right to run for elective office and that of the voters to elect him. [10] The court first determined whether the district demonstrated that the public interest was better served by enforcement of the agreement than by non-enforcement. There was no question that the public interest at stake in this case was of the highest order. [11] A restriction of Davies' right to run for or serve on the Board resulted in a limitation on the fundamental right to vote of every resident of Grossmont Union High School District. Therefore, the court concluded that here the public interest favoring non-enforcement was of critical importance. [12] Here, the only interest advanced by the school district other than the general interest in the settlement of litigation was its startling rationale that, because Davies was such a troublesome person, the voters should not be free to elect him as their representative. Not only did the court found this rationale for enforcement utterly unpersuasive: it was pernicious. [13] The court rejected this reasoning for another reason as well. To treat political rights as economic commodities corrupts the political process. [14] Thus, the district was left with only with [sic] interest in the settlement of litigation. But this interest could not by itself outweigh a substantial public interest on the other sides of the scales. [15] There was, however, another reason why the court refused enforcement of the waiver provision in this case. The district did not have a legitimate reason for including

the waiver in the particular agreement. The nexus between the individual right waived and the dispute that was resolved by the settlement agreement was not a close one.

COUNSEL

Kenneth S. Klein, James T. Hannink, Gray, Cary, Ames & Frye, San Diego, California, for the plaintiff-appellant.

Richard J. Currier, C. Anne Hudson, Judith S. Islas, Littler, Mendelson, Fastiff & Tichy, San Diego, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

This appeal challenges the enforceability of a contract provision restricting appellant's right to run for public office. The provision is contained in a settlement agreement between appellant and the governmental entity involved. That agreement in turn formed the basis for a "dismissal and release and order thereon." We hold that the public policy favoring enforcement of such a provision is outweighed by the public policy served by its non-enforcement. We therefore declare the provision void as contrary to public policy and reverse the district court's contempt order based on its violation.

BACKGROUND

The appellant, Dr. Davies, seeks reversal of the district court's order finding him in contempt of a 1989 order

dismissing his previous action against the defendant Grossmont Union High School District (the "District") in accordance with a settlement agreement, and ordering him to resign immediately.

In 1988, Dr. Davies and his wife sued the District in state court, alleging violations of 42 U.S.C. § 1983 and various state law causes of action in connection with the District's transfer of Mrs. Davies, who had been employed as a teacher in the District. The District removed the action to the United States District Court for the Southern District of California, which remanded the pendent state claims on discretionary grounds. Dr. Davies erroneously remained a named plaintiff in the federal action, although his only claim, for loss of consortium, had been remanded.

In November 1988, both Dr. Davies and Mrs. Davies executed an agreement with the District, which served to settle the federal action. The agreement provided, *inter alia*, that the Davieses would dismiss their actions in state court and federal court against the District in return for a payment of $39,200. The agreement also provided that "neither one nor both of [the Davieses] will ever seek, apply for, or accept future employment, position, or office with Defendant District in any capacity." The district court approved the settlement agreement and dismissed the federal action in an April 11, 1989 written order. The Davieses subsequently dismissed the state action.

Over a year later, on August 2, 1990, Dr. Davies publicly declared his candidacy for the Governing Board of the District; he was elected to the Board on November 6, 1990. After the election, but before he was sworn in to

office, the District brought a motion to enforce the settlement agreement in the district court, seeking an order of contempt against Dr. Davies for violating the April 1989 order. While the motion was pending, Dr. Davies took the oath of office in another county. After a hearing on December 12, 1990, the district court granted the motion and found him in contempt of the 1989 order. The district court ordered him to resign his office immediately and to pay attorney fees to the District. The court denied his request for a stay of its order pending appeal to this court. Dr. Davies resigned, effective December 13, 1990. The record does not reflect whether he paid the attorney fees.

Dr. Davies appealed to this court and sought an emergency stay of the district court's order, or in the alternative, an injunction preventing the District from filling his position on the Board during the pendency of his appeal. A speedy resolution of the issues raised was essential to both parties: if the Board appointed someone other than Dr. Davies to the seat he had relinquished, Dr. Davies might have lost his ability to withdraw his resignation; and so long as the seat remained vacant, the Board could not make crucial decisions necessary to the operation of the School District.[1] Therefore, upon

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[1] The Board ordinarily consists of five members. Because Dr. Davies' seat was vacant, there were only four members. Of these, one was unavailable because he had been called to military duty as part of Operation Desert Storm. This left only three active members. Yet, under California law, various actions may not be taken without four votes. *See e.g.*, Cal. Elec. Code §§ 35164, 39481, 39521. Numerous others require at least three votes. *See e.g.*, Cal. Elec. Code §§ 44830, 45022, 45103.

stipulation of the parties, on January 30, 1991, a motions panel of this court ordered that the case be placed on the next oral argument calendar.[2] Further, in accordance with the parties' stipulation, temporary injunctive relief was granted. On February 11, 1991, we issued an unpublished order reversing the district court and vacating the contempt order and Dr. Davies' ensuing resignation. This opinion is issued in accordance with that order.

ANALYSIS

A. Jurisdiction

[1] Dr. Davies asserts that the District may challenge his election only through the quo warranto proceedings afforded by state law. *See* Cal. Civ. Pro. Code § 803. The district court had jurisdiction over this case, however, because district courts have power to enforce their own orders and to adjudge anyone in civil contempt who wilfully violates such orders. *See United States v. Grant*, 852 F.2d 1203 (9th Cir. 1988).[3] Any available state remedy

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[2] At the oral argument on February 6, 1991, counsel for the District stated that in the week between our grant of temporary relief and the argument, one of the three active Board members had died, making a swift resolution of the appeal even more urgent. *See supra*, n.1.

[3] Davies argues that the district court's April 1989 order did not incorporate the settlement agreement, and therefore cannot form the basis for a contempt order based on that agreement. We have noted that a district court may enforce a settlement agreement "in contempt proceedings for violation of a court order approving the settlement and commanding or enjoining particular conduct." *TNT Marketing, Inc. v. Agresti*,

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would not divest the district court of this inherent power to enforce its own orders.

[2] We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the district court's post-judgment contempt order is a final order in the district court. *See Grant*, 852 F.2d at 1204. In addition, we are not deprived of jurisdiction by virtue of the fact that appellant resigned his office. Ordinarily, compliance with a contempt order renders the appeal moot because the appellate court is left with no remedy to afford the appellant. *See Thomassen v. United States*, 835 F.2d 727 (9th Cir.

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796 F.2d 276, 278 (9th Cir. 1986). The April 1989 order that formed the basis for the contempt proceeding was part of a "dismissal and release and order thereon." While the "dismissal and release" portion of that document expressly acknowledges and incorporates the 1988 settlement agreement and releases all parties from further obligation in reliance on the agreement, the order merely directs that the dismissal and release be entered in the official docket. This presents a legal question: may a court order dismissing a case based on a settlement agreement form the basis for a judgment of contempt for failure to abide by the agreement when the *order* does not by its own terms direct the parties to abide by the agreement?

Dr. Davies first raised this issue cursorily in a supplemental brief to which the District did not have an opportunity to respond. Neither party addressed the issue during oral argument. The district court, of course, had no opportunity to consider it at all. Accordingly, we are reluctant to decide the question in this case. Because we hold below that the challenged provision of the settlement agreement was unenforceable in any event, it is unnecessary for us to do so.

1987). However, there is an exception to the general principle: where compliance does not prevent this court from fashioning adequate relief, a live controversy exists and the appeal is not moot. *See id.* at 731-32 (where taxpayer complied with contempt order and paid attorneys' fees, appeal seeking return of fees was not moot). Here, Dr. Davies seeks reinstatement to the Board, relief which we can grant because his position is still vacant. Similarly, if he has paid the attorney fees, we can treat his appeal as seeking their return.

Moreover, the District bears the burden of showing that the case is moot, and that burden "is a heavy one." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). Here, as we have stated, the record does not reveal whether Dr. Davies has complied with the order to pay attorney fees. Therefore, the District has not met its burden with respect to the fee question and for that reason also cannot establish that the case is moot.

[3] Finally, there is a third reason why the appeal is not moot. The clear import of the district court's order was not merely that Dr. Davies was to resign from the Board: the order effectively forbade him from *ever* seeking a position on the Board. He most certainly has not complied with that order. Thus, the order has prospective effects and is for that reason as well subject to challenge on appeal.

B. Standard of Review

The punishment imposed in a civil contempt proceeding is subject to review for abuse of discretion. *See*

United States v. Grant, 852 F.2d at 1205. However, the legitimacy of the contempt adjudication is based on the validity of the underlying order. *See Scott & Fetzer Co. v. Dile*, 643 F.2d 670, 675 (9th Cir. 1981). Appellant here primarily challenges the enforceability of the underlying order upholding the settlement agreement (see section E below). We review de novo a legal challenge to the interpretation of a settlement agreement. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989).

C. Application of the Settlement Agreement

[4] We first address appellant's argument that the settlement agreement should not bar his election because: (1) its terms do not apply to elective office; and (2) he did not knowingly intend to waive his constitutional right to run for office. We are not persuaded by these arguments.

[5] The language of the settlement provision is clear. It states that Dr. Davies will "never seek or accept any office or position with the District in any capacity." "Any" is an all-encompassing term. Here, the parties used two "any's" in one sentence in order to make certain there would be no doubt as to their intent. As the district court pointed out in its December order, it is true that the provision does not explicitly refer to elective office, but it also does not explicitly refer to employment as a teacher. The reason for both omissions is that the terms are sufficiently clear that it is not necessary to list either of the prohibitions specifically. *See Muckleshoot Tribe v. Puget Sound Power & Light*, 875 F.2d 695, 698 (9th Cir. 1989); *Dart Industries Co. v. Westwood Chemical Co.*, 649 F.2d 646, 648

(9th Cir. 1980). That "any office" includes elective office is a proposition that requires no further explication.

[6] Likewise, Dr. Davies' argument that he did not knowingly waive his constitutional rights is without merit. The Supreme Court has recognized that constitutional rights may ordinarily be waived if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972). Dr. Davies relies only on the knowingness requirement here. Several factors, collectively, lead us to the conclusion that his waiver was knowing. First, he was represented by counsel during settlement negotiations. Second, the settlement agreement which he signed stated that he had been advised of the consequences of its terms and *knowingly* entered into the agreement. Third, it seems evident that Dr. Davies, a highly educated person must have understood the plain meaning of the term "seek or accept any office." Accordingly, we cannot accept his contention that he thought it meant "seek or accept any office but elective office." Dr. Davies' affidavits attesting that he did not intend such a waiver and that elective office was not an issue at the time the settlement was reached because he did not then live in the district are irrelevant. It is possible to knowingly waive a general right without contemplating the specific circumstances under which that waiver will be enforced.[4] We therefore conclude that Davies' waiver was knowing.

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[4] *See also Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1097-98 (3rd Cir. 1988) (enforcing contractual release

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D. Waiver or Estoppel by the District

We next address appellant's argument that the District waived its right under California law to enforce the settlement agreement because it did not object to the public announcement of his candidacy in August, but waited until after he was elected to challenge his right to hold office under the agreement. Dr. Davies' argument may alternatively be characterized as one of estoppel: essentially he contends that he understood the Board's failure to attempt to enforce the agreement during the entire period of the election campaign to mean that the Board was relinquishing its right to do so, and that by spending time and money campaigning for office, he detrimentally relied on the Board's implicit representation. *See Adams v. Johns-Manville Corp.*, 876 F.2d 702, 707 (9th Cir. 1989) (setting forth the elements of estoppel under California law).[5]

[7] To establish a waiver by the District of its right to enforce the settlement agreement, Dr. Davies must show

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of constitutional claims, including supposedly "unknown" claims, where the release unambiguously applied to "any" claims).

[5] The parties have relied on California law in briefing this question. As we hold below, on the basis of the present record Dr. Davies cannot prevail on the waiver/estoppel issue under California law. Because the federal standard is more stringent than the state standard, *Sawyer v. County of Sonoma*, 719 F.2d 1001, 1006 n.11 (9th Cir. 1983), our holding necessitates the conclusion that Dr. Davies cannot establish his defense under federal law either. Accordingly, we need not decide whether California law or federal law applies.

either: that the District, with full knowledge of the facts and an intent to waive the right, made a *clear expression* of its intent; or that he has carried his burden of establishing that the District's *conduct* warrants the inference that it has relinquished that right. *See Sawyer v. County of Sonoma*, 719 F.2d 1001, 1008 (9th Cir. 1983) (citing *White Point Co. v. Herrington*, 268 Cal.App.2d 458, 468-69, 73 Cal. Rptr. 885, 891 (1968)).

The District contends that it did not knowingly waive its right because the Superintendent – the individual responsible for verifying the eligibility of Board candidates – assumed his office after the settlement agreement was approved by the district court, and did not have knowledge of its terms: the parties agree that the settlement agreement was sealed in 1989. On the other hand, Dr. Davies has presented affidavits tending to show that some of the current Board members knew about the agreement at the time Davies declared his candidacy.

[8] It is apparent that both the waiver inquiry and the estoppel inquiry require "factually intensive" showings by Dr. Davies. *E.g.*, *Adams*, 876 F.2d at 707 (estoppel). Because of the urgency of the motion in the court below, *see supra*, n.1; *see also supra*, n.2, the district court neither conducted a hearing nor made factual findings with respect to either waiver or estoppel. As a result, we are unable to conclude on the basis of the current record that the District waived its right to enforce the agreement or that the District should be estopped.[6]

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[6] As a practical matter, the urgency of this appeal foreclosed the possibility of remanding the proceedings to the

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E. Public Policy

[9] Dr. Davies' fundamental argument involves a public policy issue of first impression. He asserts that the provision precluding him from seeking or holding elective office violates public policy, and therefore should not be enforced. He contends that enforcement would violate his constitutional right to run for elective office and the constitutional right of the voters to elect him. We agree.

The question whether the waiver of federal constitutional rights is enforceable is a question of federal law, which we resolve by the application of federal common law.[7] *See Town of Newton v. Rumery*, 480 U.S. 386, 392

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district court for the development of a more complete factual record. *See supra*, n.1, n.2. Because we hold below that the challenged provision of the settlement agreement is unenforceable as against public policy, Dr. Davies is entitled to the relief he seeks regardless of whether he could have ultimately prevailed on a defense of waiver or estoppel. Thus, a remand would in any event have served no purpose.

[7] Dr. Davies also argues that the provision at issue is unenforceable under California law, citing decisions of the California Supreme Court invalidating restrictions on the right to run for office. *See, e.g., Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966) (striking down rule requiring public employee to resign upon declaration of candidacy for public office); *Kinnear v. City and County of San Francisco*, 61 Cal. 2d 341, 392 P.2d 391, 38 Cal. Rptr. 631 (1964) (same); *Fort v. Civil Service Comm'n*, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964) (same). That is very likely the case. However, the cited decisions are based on the California Supreme Court's interpretation of the *federal* Constitution. While the *Fort* court mentions art. I, § 2 of the California

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(1987). *Rumery* involved the question whether a release of individual rights in a private settlement agreement with a public official violated public policy. The Court held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." 480 U.S. at 392. *See also* Restatement (Second) of Contracts § 178 (1981) (if no legislation regulates the conduct at issue, courts must weigh the parties' and public interest in enforcement of the contract against the strength of the public policy implicated by the contract and the furtherance of such policy by failure to enforce the contract).

In *Rumery*, an individual charged with criminal tampering with a witness to a sexual assault prosecution entered into an agreement with the prosecutor, whereby the criminal charges against him were dropped in return for his waiver of all rights to bring a civil action against the prosecutor. The Supreme Court held that such agreements are not per se unenforceable and that the particular agreement at issue in that case had been knowingly and voluntarily entered into. The Court then proceeded to apply the balancing test, finding that the public interest in enforcement of the agreement outweighed the policies furthered by non-enforcement.

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Constitution, 38 Cal. Rptr. at 627, its decision appears to stem entirely from considerations relating to the first amendment to the federal Constitution, as do the decisions in *Kinnear* and *Bagley*. We find these three decisions highly persuasive, but they are not in themselves compelling precedent for the proposition that there is a separate basis in *state* law for not enforcing the challenged provision.

A brief description of how the Court struck the balance in *Rumery* is instructive here. Several factors favored enforcement: the Court found that the agreement accomplished the efficient resolution of criminal charges, the avoidance of a questionably valid civil action at great expense to the public to defend, and the avoidance of embarrassment to and public scrutiny of the witness, who had been the complainant in a sexual assault case. On the other side of the scale, the Court acknowledged the concern that the availability of such agreements might tempt prosecutors to trump up criminal charges against individuals in an attempt to coerce them into releasing their rights under 42 U.S.C. § 1983, but found that such concerns were not justified in that case, where there was no evidence of such misconduct. Most significantly for our purposes, in *Rumery* the Court relied on the fact that the rights released by Rumery were, in the Court's view, mere private rights: thus the Court believed that the surrender of these rights did not have a significant impact upon the public at large. It found that there was no broad public interest that outweighed Rumery's voluntary decision to enter into an otherwise valid agreement. *Id.* at 394-5.

While *Rumery* involved the surrender of a *statutory remedy*, here we confront the waiver of a *constitutional right*. This suggests two important distinctions between *Rumery* and the present case. First, because constitutional rights are generally more fundamental then statutory rights, a stricter rule than the one embodied by the *Rumery* balancing test may be appropriate in such cases. Second, foregoing a remedy of money damages for a past

injury that cannot be undone may not implicate the public interest to the same extent as does the surrender of the right itself. It could well be argued therefore that the District must meet a higher burden here than is required under the *Rumery* test. However, we need not decide whether *Rumery* or a stricter standard applies to waivers of constitutional rights, because even under the *Rumery* test we find that the waiver provision is unenforceable.

[10] Assuming without deciding that the *Rumery* standard is applicable, we must determine whether the District has demonstrated that the public interest is better served by enforcement of the settlement agreement than by non-enforcement.[8] We first consider the public policies favoring non-enforcement of the challenged waiver provision. There is no question that the public interest at stake in this case is of the highest order. It involves the most important political right in a democratic system of government: the right of the people to elect representatives of their own choosing to public office. The United States Supreme Court has repeatedly held that the individual's right to seek public office is inextricably intertwined with the public's fundamental right to vote, and

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[8] In *Rumery* five Justices (the four dissenters plus Justice O'Connor, who concurred) expressly placed the burden of proof with respect to enforceability of a waiver of a civil right on the government. Subsequently, we made clear that the view of these five Justices is the law in this circuit. *See Lynch v. City of Alhambra*, 880 F.2d 1122, 1125-26 (9th Cir. 1989). However, the burden of proof is not dispositive here. We would hold the challenged provision of the settlement agreement unenforceable regardless of which party bore the burden of proof.

may be limited only where necessary to achieve a compelling state purpose. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) (holding that an early filing requirement placed an unconstitutional burden on independent candidates and on the voting rights of his supporters); *Lubin v. Panish*, 415 U.S. 709 (1974) (holding that the state must provide alternative to fee requirement for indigent candidates); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating fee requirement as unreasonable burden on candidates). *See also Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973) (right to run for office is protected by First Amendment). *See also* cases cited in n.7, *supra*.[9]

[11] It is therefore clear that the right claimed by Dr. Davies is, by its nature, one that implicates the public interest. A restriction of Dr. Davies' right to run for or serve on the Board results in a limitation on the fundamental right to vote of every resident of Grossmont Union High School District. This is precisely the sort of

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[9] As the Supreme Court has recognized, notwithstanding the fact that the rights of voters are fundamental, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. This need to regulate the process of holding elections will generally justify the enforcement of "complex election codes [that] govern[] the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself. . . ." *Id. See, e.g., Burdick v. Takushi*, No. 90-15873, slip op. 2321 (9th Cir. Mar. 1, 1991) (upholding Hawaii's election procedures notwithstanding the absence of a provision for write-in ballots). There is no suggestion that the restriction on voters' rights that would result from enforcing Dr. Davies' waiver of his right to run for the Board is justified by, or even relates to, the state's interest in governing the mechanics of an election.

effect on the public at large that was absent in *Rumery*, 480 U.S. at 395.[10] We conclude that here the public interest favoring non-enforcement is of critical importance.

We now address the factors that favor enforcement. The District asserts two public policy considerations that, it contends, support upholding the waiver in this case. The first is a policy favoring enforcement of private agreements and the encouragement of settling litigation. *See Kiddie Rides, Inc. v. Southland Engineering, Inc.*, 361 F.2d 575 (9th Cir. 1966). This policy interest is admittedly important. However, it is an interest that will be present in every dispute over the enforceability of an agreement terminating litigation. In a case presenting no public interest that would be harmed by enforcement of the waiver provision, the countervailing interest in settlement will be enough to justify enforcement. But where a substantial public interest favoring nonenforcement is present, the interest in settlement is insufficient. Otherwise, there would be no point to the *Rumery* balancing test: since the interest in settlement is present in every case, every settlement agreement would be enforced. Clearly then, when there is a substantial public interest

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[10] We do not mean to suggest that in order to implicate the public interest the deprivation of a constitutional right must result in a distinct injury to the public at large. The deprivation of the individual's right may well in itself be sufficient to constitute a public injury. Even in *Rumery* the Court found that there was "a public policy harmed by enforcement," 480 U.S. at 392, as a result of the injury to the *individual*, although the Court concluded in that case that the particular harm was outweighed by public policies favoring enforcement.

that would be harmed by enforcement – as is unquestionably the case here – the party seeking enforcement must, at the least, advance some important interest in addition to the interest in settlement.

[12] Here, the only interest advanced by the District other than the general interest in the settlement of litigation is its assertion that its constituents would be harmed by Dr. Davies' participation in the operation of the District. In effect, the District's argument comes down to a rather startling rationale: Dr. Davies is such a troublesome person that the voters should not be free to elect him as their representative. Not only do we find this rationale for enforcement utterly unpersuasive: it is pernicious. Although we have denominated the defendant in this case "the District," we cannot overlook the fact that the real parties in interest urging enforcement of the settlement agreement are the current members of the Board, with whose policies Dr. Davies vigorously disagrees.

The current Board members may sincerely believe that their policies are correct and that they know better than the voters who should be on the Board – and perhaps they are right. Democracy does not, after all, guarantee good government or even the election of well qualified individuals. We have certainly experienced enough examples of this unfortunate fact over the past two hundred-odd years. However, democratic government is premised on the proposition that the people are the best judges of their own interests, and that in the long run it is better to permit them to make their own mistakes than to permit their "rulers" to make all their decisions for them. As judges sworn to uphold the Constitution we

must accept this view. Within the bounds set by the United States Constitution and the state constitutions, the will of the majority must prevail. There is no suggestion that Dr. Davies' participation on the School Board would transgress those bounds. Therefore, we reject the District's definition of a public interest at odds with the public will.

[13] We must reject the District's second argument for another reason as well. To treat political rights as economic commodities corrupts the political process. Just as we would not enforce a contract stating that voter X will vote for candidate Y in exchange for a sum of money, so too we will not enforce an agreement whereby a citizen receives money in exchange for a promise not to exercise his right to run for office. As harmful as such agreements are in general, they are particularly offensive where, as here, the parties authorizing the payment are elected officials and the recipient is a potential political opponent. This sort of arrangement is a serious abuse of the power of incumbency. *Cf. Sheppard v. Lee*, No. 89-16188, slip op. 4135, (9th Cir. March 28, 1991) (terming County Supervisors' firing of a county employee because he planned to run for the position of Supervisor "inconsistent with our tradition of fair and free elections" and stating that "[t]he Supervisors' efforts to perpetuate themselves in office and to burden the rights of those who would oppose them are offensive to basic democratic principles"); *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (describing the dangers posed by "elected officials engaged in the single-minded pursuit of incumbency"), *cert. denied*, 111 S.Ct. 681 (1991).

[14] Because the second interest purportedly served by enforcement of the provision carries no weight, the District is left with only its previously discussed interest in the settlement of litigation. As we stated earlier, this interest cannot by itself outweigh a substantial public interest on the other side of the scales. We conclude that in the case before us the public policy favoring nonenforcement vastly outweighs any interest in enforcement.

[15] Finally, we note that there is a further reason why we refuse to enforce the waiver provision in this case. Before the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement. A legitimate reason will almost always include a close nexus – a tight fit – between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.[11] For example, in *Rumery* the interests the government sought to advance in the underlying litigation were closely related to the underlying interest waived. Both the criminal charges that had been filed against Rumery and Rumery's civil suit against the prosecutor involved the same incident. In fact, they were the opposite sides of the coin. The two actions reflected the opposing parties' differing versions of what actually occurred. Thus, in *Rumery*, a full compromise of the dispute between the parties necessitated

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[11] This case concerns a settlement agreement with a government entity. We do not here consider the proper role of nexus in agreements involving only private parties.

resolving both matters. Here, by contrast, the nexus between the individual right waived and the dispute that was resolved by the settlement agreement is not a close one. The underlying dispute had little connection with Dr. Davies' potential future service on the Board. Had it not been for the District's insistence on the inclusion of the waiver provision in the settlement agreement, Dr. Davies' right to run for elective office could not have been affected by a resolution of the litigation. Nevertheless, the District extracted a waiver of Dr. Davies' right ever to seek or accept a position on the Board as a condition to settling the lawsuit.

The absence of a close nexus will ordinarily show that the government is seeking the waiver of important rights without a legitimate governmental interest that justifies doing so. Although there may be circumstances in which the public interest that would be served by enforcement of a settlement agreement is so strong that it outweighs the absence of a close nexus, such cases are the exception rather than the rule. Here, the government has put forward no public interest that would rebut the presumption of unenforceability. Accordingly, in addition to the reasons we have previously expressed, we conclude that the waiver is unenforceable because of the absence of a close nexus.

CONCLUSION

The District has failed to advance a public interest in enforcement of Dr. Davies' waiver of his right to seek and hold office sufficient to outweigh the public's interest in maintaining the full and fair right to vote. Consequently,

we hold that the waiver provision in the settlement agreement between the District and Dr. Davies is void insofar as it purports to bar him from ever seeking or holding elective office in the District. This does not affect the validity of the remainder of the agreement, which contains an express severability provision, under the terms of which any part of the agreement which is declared void shall not invalidate any other part of the agreement. *See ICN Medical Laboratories, Inc. Employees' Profit Sharing Plan v. ICN Medical Laboratories, Inc.*, 682 F.2d 1326 (9th Cir. 1982).

The district court's December 12, 1990 order finding Dr. Davies in contempt of the 1989 order dismissing the prior action pursuant to the settlement agreement is vacated, including the provision for the payment of attorneys fees. Dr. Davies' resignation tendered pursuant to that order, effective December 13, 1990, is of no force or effect. Any fees he may have paid to the District pursuant to the district court's order shall be returned to him.

REVERSED and VACATED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS DAVIES Plaintiff-Appellant, v. GROSSMONT UNION HIGH SCHOOL DISTRICT; MONTE VISTA HIGH SCHOOL; JENNIFER ELIOTT; ROBERT PYLE; PAUL MARTIN; CHRISTOPHER BOGDEN; GERALD GORDINIER; and DOES 1 through 20, inclusive, Defendants-Appellees.	No. 91-55140 D.C. No. 88-0337-JLI (M) ORDER FILED FEB 11 1991

Appeal from the United States District Court
for the Southern District of California
Hon. J. Lawrence Irving, District Judge,
and Hon. Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted February 6, 1991
Pasadena, California

Before: BROWNING, D.W. NELSON, and REINHARDT, Circuit Judges

ORDER

The judgment of the district court is reversed because the interest in enforcement of the provision in the settlement agreement barring Dr. Davies from serving as a member of the school board is outweighed by the public policy interests harmed by its enforcement. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Lynch v. City of*

Alhambra, 880 F.2d 1122 (9th Cir. 1989). The district court's contempt order of December 12, 1990, is vacated. Dr. Davies' resignation tendered in compliance with that order shall have no force or effect. A full opinion will follow.

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THOMAS DAVIES and NADIA DAVIES, Plaintiffs, v. GROSSMONT UNION HIGH SCHOOL DISTRICT; MONTE VISTA HIGH SCHOOL; JENNIFER ELIOTT; ROBERT PYLE; PAUL MARTIN; CHRISTOPHER BOGDEN; GERALD GORDINIER; and DOES 1 through 20, Inclusive, Defendants.	CASE NO. 88 0337 JLI (M) MEMORANDUM, DECISION AND ORDER FILED DEC 18 1990 ENTERED DEC 19 1990

On December 12, 1990, a hearing was held before the undersigned United States District Court Judge on the Application For Enforcement Of Compromise Settlement Release and Order Thereon and For Order To Show Cause Re Contempt. Richard J. Currier and C. Anne Hudson of Littler, Mendelson, Fastiff & Tichy appeared on behalf of Grossmont Union High School District. Clinton L. Smith appeared on behalf of Thomas P. Davies. After reviewing the numerous pleadings filed in this action and considering the oral arguments of counsel for Thomas Davies and the Grossmont Union High School District, the Court finds and orders as follows:

I

FINDINGS

1. The Court finds that it has jurisdiction over the subject matter of the litigation and over Dr. Davies personally. The quo warranto remedy potentially available in state court does not foreclose this Court's proper jurisdiction over its previously signed federal order. Section 803 of the California Code of Civil Procedure is a state remedy that may be brought by the Attorney General in the name of the people when the title of an official is in question. The existence of an adequate state remedy, however, does not bar a federal court from exercising federal jurisdiction under the case of *McGuire v. Sadler,* 337 F 2d 902 (5th Cir. 1964). Here, quo warranto is not even an adequate remedy because it is one brought by the people to enforce state statutes or common-law doctrines, not private agreements signed into order by a federal court.

2. The Court also possesses jurisdiction over Dr. Davies personally. This Court finds that the order which this Court signed in April of 1989, incorporates the Stipulation by the clear language of the order. Secondly, Dr. Davies' state claim was dismissed by him after the stipulation was entered into. Further, he was a willing party to the entire action before the Court, and his name appeared in the caption of the Court papers. Additionally, he benefitted from the bargain he struck, to the tune of his share of $39,200. This Court finds that any questions as to the Court's jurisdiction over particular parties have been waived by virtue of the settlement agreement, under *Ridgeway v. Montana High School Association,* 633 F Supp

1564, at page 1568 (D. Montana 1986) which was affirmed by the Ninth Circuit – *Ridgeway v. Montana High School Association*, 858 F 2d 579 (9th Cir. 1988).

3. This Court finds that Dr. Davies' waiver of his constitutional right to run for elected office was knowing and voluntary. The language of the waiver was clear and unambiguous, and it was obviously intended to put an end to all disputes, including those of a constitutional dimension. The language of the Stipulation, which was signed by all the parties in November of 1988, is clear and unequivocal. It states, in the plural, that "plaintiffs each agree that neither one nor both of them will ever seek, apply for, or accept future employment, position or office with defendant district in any capacity." This term is set forth at paragraph 9, page 6 of the November 1988 Stipulation. The Stipulation does not state that Dr. Davies shall be prohibited from running for or accepting the elected position of Governing Board member or trustee of the district. It also does not state he is prevented from being a teacher or a superintendent. This is because all of these are clearly within the language of the agreement. Dr. Davies is a well educated man, as evidenced by his Ph.D. He was represented by able counsel. The Settlement was not entered into hastily, but was agreed to after considerable time and contemplation by both parties. Finally, the Settlement afforded Dr. Davies a substantial benefit. In essence, Dr. Davies sold his constitutional right to the District for his share of $39,200, and is precluded from asserting it now.

4. The Court is not prohibited from enforcing its order by laches, unclean hands or California Elections

Code section 10015. There was no effective adequate remedy available to the defendants under the state law, and hence the defendant district is not precluded from enforcement of its agreement with the plaintiff.

5. The Federal Court's power to enforce its order is not outweighed by a public policy to enforce a term of office. The office was obtained in violation of a court order, and hence cannot be condoned by this Court. Under the facts presented to the Court, Dr. Davies knowingly violated the terms of the settlement agreement, and thus the Federal Court order. There is no question that a federal court has the authority to enforce the settlement agreement that it signed into order, under *Van Leeuwen v. Farm Credit Administration*, 600 F Supp, 1161 (D.C. Oregon 1984).

In addition, this Court finds that Dr. Davies knew, with certainty, before he was sworn in on Friday, December 7, 1990, that he was subject to the federal order. Dr. Davies cannot defeat this Court's jurisdiction by jumping the gun on his swearing in, and his attempt to do so belies his protests that he did not know that the order incorporating the Stipulation prevented him from holding the position on the Governing Board. In summary, based on the facts presented to the Court, the Court finds that Dr. Davies willfully disobeyed this Court's order of April 10, 1989.

6. This Court finds that an award of attorneys' fees in the amount of $25,875 is reasonable under all of the circumstances in this case. *Kerr v. Screen Extras Guild, Inc.*, 526 F 2d 67 (9th Cir. 1975), cert. denied 96 S. Ct. 1726

(1976). The Court utilized the twelve guidelines listed in *Kerr*, and finds as follows:

(1) With regard to the time and labor required, there was a substantial amount of labor required over a brief period;

(2) With regard to the novelty and difficulty of the questions involved, there were novel issues raised;

(3) With regard to the skill requisite to perform the legal service properly, there was a requirement of great skill with regard to the issues and the brief period;

(4) With regard to the preclusion of other employment by the attorney due to acceptance of the case, this factor was not applicable;

(5) With regard to the customary fee, the award of attorney's [sic] fees is based on the current hourly rate charged to the Grossmont Union High School District by attorneys, and this hourly rate of $115.00 is fair and reasonable;

(6) With regard to whether the fee is fixed or contingent, the attorneys' fees are at a fixed hourly rate;

(7) With regard to time limitations imposed by the client on the circumstances, both the client and the circumstances demanded immediate attention and a great amount of work over a brief period;

(8) With regard to the amount involved and the results obtained, the amount of attorneys' fees awarded is reasonable in view of the successful results;

(9) With regard to the experience, reputation, and ability of the attorneys, the attorneys for the Grossmont

Union High School District are highly experienced, enjoy an excellent reputation representing public school districts, and are highly able;

(10) With regard to the "undesirability" of the case, this factor was not applicable;

(11) With regard to the nature and length of the professional relationship with the client, the Grossmont Union High School District has been an important and valuable client of attorneys for a decade;

(12) With regard to awards in similar cases, this factor was not applicable, as the Court is not aware of any similar cases.

II

ORDERS

1. Dr. Davies is ordered to resign his office as a member of the Governing Board of the Grossmont Union High School District effective immediately.

2. Dr. Davies is ordered to pay attorneys' fees and costs to the district for their prosecution of this order, under the authority in *Dow Chemical Company v. Chemical Cleaning, Inc.*, 434 F 2d, 1212 (5th Cir. 1970), cert. den. 402 U.S. 945. Attorneys' fees and expenses certainly may be awarded for the willful disobedience of a court order. As authority for that, see *Ranco Industries v. Dunlap* at 776 F 2d, 1135, citing to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S., 240, a 1975 United States Supreme Court case. Even if Dr. Davies' violation of the court order were not willful, an award of attorneys' fees is appropriate as a

remedial measure in this case. As authority for that, see *Perry v. O'Donnell*, 759 F 2d 702, 705, (9th Cir. 1985).

Dr. Davies is ordered to pay attorneys' fees and costs to the Grossmont Union High School District in the amount of $25,875.00. The amount is to be made payable to the Grossmont Union High School District by certified or cashier's check and to be delivered to Richard J. Currier at 701 "B" Street, Suite 300, San Diego, California 92101. Payment of the full amount is to be made within sixty (60) days of the date of this order. This amount is calculated on the basis of two hundred and twenty-five (225) hours expended by attorneys for the Grossmont Union High School District and the hourly rate of one hundred and fifteen dollars ($115.00) which is the reasonable hourly rate currently charged by attorneys to the Grossmont Union High School District.

3. The request for stay by Dr. Davies is denied.

DATED: December 18, 1990

/s/ J. Lawrence Irving
J. LAWRENCE IRVING
United States District
Court Judge

PREPARED BY: /s/ Richard J. Currier
RICHARD J. CURRIER

/s/ C. Anne Hudson
C. ANNE HUDSON

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Supreme Court, U.S.
FILED
JUN 10 1991
OFFICE OF THE CLERK

(2)

No. 90-1720

In The

Supreme Court of the United States

October Term, 1990

GROSSMONT UNION HIGH SCHOOL DISTRICT,

Petitioner,

v.

THOMAS DAVIES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit properly conclude that, under the circumstances of this case, it offends important public interests to enforce a provision of a settlement agreement that treats political rights as economic commodities, and allows incumbents to use litigation settlements to exclude political opponents.

PARTIES TO THE PROCEEDING BELOW

Dr. Thomas Davies, respondent herein, disputes the Grossmont Union High School District's recitation of "Parties to the Proceedings Below." The school district asserts that "[t]he school district alone petitions this Honorable Court." A more accurate description is that propounded by the Ninth Circuit, "Although we have denominated the defendant in this case 'the District,' we cannot overlook the fact that the real parties in interest urging enforcement of the settlement agreement are the current members of the Board, with whose policies Dr. Davies vigorously disagrees." (Petition Appendix, at A-21.)

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No. 90-1720

In The

Supreme Court of the United States

October Term, 1990

GROSSMONT UNION HIGH SCHOOL DISTRICT,

Petitioner,

v.

THOMAS DAVIES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Dr. Thomas Davies ("Dr. Davies" or "respondent") respectfully submits this Brief in Opposition to Grossmont Union High School District's (the "school district" or "petitioner") Petition for Writ of Certiorari.

PROVISION OF LAW INVOLVED

The single provision of federal law in question is U.S. Const., amend. I, which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This litigation is the latest round in an acrimonious political dispute. For over twenty years, Nadia Davies, respondent's wife, was employed by petitioner, the school district, as a school teacher and department chairperson. (Petition Appendix, at A-6.) In the late 1980's, petitioner hired a principal who ignored state requirements for education of disadvantaged children. Mrs. Davies disagreed with the new principal's approach to those policies. The principal retaliated by transferring Mrs. Davies to another school. An employment dispute resulted.

In January 1988, after exhausting administrative remedies, respondent and his wife filed an action in the Superior Court of the State of California against petitioner and its board of trustees (the "Governing Board"). (Petition Appendix, at A-6.) The lawsuit included several causes of action on behalf of Mrs. Davies, including her assertion that the school district's actions violated 42 U.S.C. section 1983. *Ibid.* Respondent asserted only one

cause of action, for loss of consortium. *Ibid.* When petitioner removed the case to federal district court, the district court accepted jurisdiction of the section 1983 claim and remanded all other claims back to the state court, including respondent's loss of consortium claim. *Ibid.* Respondent erroneously remained a named plaintiff in the federal action, even though his only claim had been remanded to state court. *Ibid.*

In November 1988, respondent and his wife executed a settlement agreement with petitioner. *Ibid.* The agreement provided, *inter alia,* that Dr. and Mrs. Davies would dismiss the state court and federal court actions against petitioner in return for payment of $39,200. *Ibid.* As part of the settlement, Mrs. Davies, having accepted employment in a different district, resigned from her employment with the Grossmont district, and waived any claim under state worker's compensation laws. (Emergency Motion Under Circuit Rule 27-3 For a Stay Pending Appeal [hereinafter "Emergency Motion"], Ex. 3.) The settlement agreement included a full release by both respondent and Mrs. Davies of all claims against the school district. *Ibid.* The only provision of the settlement agreement at issue in this proceeding is paragraph 9, which states: "Plaintiffs each agree that neither one nor both of them will ever seek, apply for, or accept future employment, position, or office with Defendant District in any capacity."[1] *Ibid.*

---

[1] At the trial court level, the school district contended that when Dr. Davies signed the settlement agreement, he knowingly and intentionally waived his right to run for a seat on the Governing Board. Now, the school district apparently concedes

(Continued on following page)

On April 11, 1989, the district court signed a "Dismissal and Release and Order Thereon." (Emergency Motion, Ex. 4.) Although the dismissal order discussed some portions of the settlement agreement, the agreement was not incorporated either by reiteration or reference. *Ibid.* The order makes no mention of paragraph 9 or its terms, and at no point intimates that the terms of the settlement agreement would be enforceable by contempt proceedings. *Ibid.* Further, the district court did not sign the settlement agreement. Dr. and Mrs. Davies then dismissed the state action. (Petition Appendix, at A-6.)

More than a year later, on August 2, 1990, Dr. Davies, having moved into the school district, publicly declared his candidacy for the Governing Board. (Petition Appendix, at A-6.) The same members of the Governing Board who had approved the settlement were still on the Board

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that at the time of the settlement, Dr. Davies did *not* contemplate that by agreeing to paragraph 9 he could be waiving his right to run for a seat on the school board (as petitioner now concedes, at that time Dr. Davies did not even live in the school district). (Petition, p. 13.) While these issues may well be important to evaluating whether Dr. Davies was intending to waive *his* rights, they have little bearing on how the settlement agreement impacts the *voters'* constitutionally protected political rights. Neither the school district nor Dr. Davies has the power, either intentionally or unwittingly, to enter into a private contract restricting the range of candidates available to the electorate. Indeed, section 29305 of the California Election Code states, in pertinent part, "A person shall not directly or through any other person advance, pay, solicit, or receive or cause to be paid or received any money or other valuable consideration . . . in order to induce a person not to become or to withdraw as a candidate for public office."

and were aware of his candidacy. (*See, e.g.*, Opposition to Emergency Motion, Ex. E.) In the course of respondent's candidacy, he appeared before the Governing Board on several occasions on matters pertaining to the election. (Supplemental Declaration of Dr. Thomas Davies in Opposition to Defendants' Order to Show Cause Re: Contempt.) On each occasion, respondent publicly identified himself as a candidate, and the President of the Governing Board publicly recognized Dr. Davies' candidacy. *Ibid.* At no time did any board member protest. *Ibid.* To the contrary, the only communication from petitioner to respondent was a mailing sent to all candidates welcoming their participation in the political process. (Emergency Motion, Ex. 8, ¶ 4.)

Respondent was elected to the Governing Board on November 6, 1990, finishing first among the six candidates.[2] After the election, when two of the incumbent board members had lost to Dr. Davies, and before the new board members took office, the old members of the Governing Board (including the two members who had just lost their seats in the election) directed the school district's attorneys to bring a motion in the district court invoking paragraph 9 of the settlement agreement. Petitioner accused Dr. Davies of being in contempt of court for his alleged violation of the April 1989 "dismissal order." *Ibid.*

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[2] The election filled three seats on the Governing Board. (Emergency Motion, Ex. 8, ¶¶ 6-8.) All six candidates were listed on a single ballot. *Ibid.* A voter could vote for any three, with the top three vote-getters taking office. Dr. Davies finished first. *Ibid.* One incumbent finished third and the other two incumbents on the ballot finished fifth and sixth. *Ibid.*

The district court granted petitioner's motion, thereby disenfranchising the 56,133 voters who had voted for Dr. Davies. (Petition, Appendix C.) In addition to ordering Dr. Davies to resign his office immediately, the district court ordered Dr. Davies to pay petitioner's attorneys' fees of more than $25,000. *Ibid.* In reaching its ruling, the district court apparently made little if any attempt to determine whether enforcement of paragraph 9 harmed important public interests or constitutionally protected political rights. *Ibid.*

Respondent appealed the contempt order to the Ninth Circuit Court of Appeals. (Emergency Motion, Ex. 1.) The Ninth Circuit vacated the district court's contempt order and declared respondent's prior resignation from the school board to be of no force or effect. (Petition Appendix, at B-2.) The Ninth Circuit also vacated the trial court's order that respondent pay petitioner's attorneys' fees.[3] *Ibid.* As a result of the Ninth Circuit's decision, respondent has resumed his rightful position on the school district's Governing Board, and has assumed all responsibilities attendant to that position.[4]

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[3] The Ninth Circuit recognized but did not decide the questions of whether the terms of paragraph 9 were incorporated into the district court's dismissal order and whether the district court had jurisdiction over Dr. Davies after his claim was remanded to state court. (Petition Appendix, at A-6, A-8 fn. 3.)

[4] For a more detailed description of the procedural history, see the Ninth Circuit's discussion at pages A-7 to A-8 of the Petition Appendix.

REASONS FOR DENYING THE PETITION

I

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

The Petition for Writ of Certiorari does not meet the standard of Supreme Court Rule 10. The rule provides, in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10 lists several reasons that might satisfy this high standard. The school district does not even arguably fit within any reason except the provision of subsection 10(c), which provides that review may be proper when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . . "

Yet here, although the Ninth Circuit decided a matter of constitutional import, the court did not depart from established legal precedent. There is an important constitutional right to candidacy. *See, e.g., Morial* v. *Judiciary Comm'n of the State of Louisiana*, 565 F.2d 295, 301 (5th Cir. 1977), *cert den.*, 435 U.S. 1013 (1978); *Stone* v. *City of Wichita Falls*, 477 F.Supp. 581, 584-85 (N.D. Tex. 1979), *aff'd.*, 646 F.2d 1085 (5th Cir. 1981), *cert den.*, 454 U.S. 1082. That right is intertwined with the general citizenry's right to vote. *See, e.g., Johnson* v. *Hamilton*, 15 Cal.3d 461, 471, 125 Cal.Rptr. 129, 541 P.2d 881 (1975). While an individual can waive most of his/her individual constitutional

rights upon a showing by clear and compelling evidence of a knowing and intentional waiver (*see, e.g., Sambo's Restaurants, Inc.* v. *City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981), *cert den.*, 454 U.S. 825), a clause of a contract purportedly waiving individual constitutional rights is void if, on balance, enforcement significantly harms important public interests. *See Town of Newton* v. *Rumery*, 480 U.S. 386, 392-97, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987); *Driessen* v. *Freborg*, 431 F.Supp. 1191, 1196 (D. N.D. 1977).

Here, the school district does not contend that the Court of Appeals failed to apply these legal standards or to balance the competing interests. Rather, the school district challenges the wisdom of the outcome.[5] The school district is dissatisfied with the Ninth Circuit's conclusion that on the facts of this particular case, the harm to the public interest is too great to allow enforcement of paragraph 9 of the settlement agreement. In other words, while the Ninth Circuit's decision is an important reaffirmation of fundamental democratic principles, it does not create new law or diverge from existing law. Therefore, the petitioner fails to satisfy Rule 10 because the Ninth Circuit's decision does not decide questions of federal law which have not been, but should be, settled by this Court.

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[5] During oral argument to the Ninth Circuit, the school district seemed opposed to the application of any balancing test. The school district's petition, however, seems to now recognize that sometimes the parties' interest in enforcement of contract provisions can be outweighed by other public interests.

II

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

A. The Petitioner Mischaracterizes the Rule of Law Applied By the Court of Appeals.

Petitioner has inaccurately characterized the Ninth Circuit's holding. Petitioner casts the first question presented for review as "whether an individual may waive his or her right to seek and hold elective office on a specific local public school board, or whether such a waiver is void under all circumstances as against public policy." (Petition, p. "i".) Petitioner's use of the words "under all circumstances" wrongly suggests that the court below applied a per se rule in holding unenforceable the challenged provision. In fact, the Ninth Circuit expressly rejected a per se rule, and applied the balancing test set forth in *Town of Newton* v. *Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) ("*Rumery*"). (Petition Appendix, at A-15 to A-19.) The Court of Appeals found the challenged provision unenforceable only after it carefully weighed the public interests for and against the enforcement of the particular challenged provision before it. (Petition Appendix, at A-18 to A-25.) Petitioner's suggestion that the Court of Appeals held such waivers "void under all circumstances" is misleading.

B. The Court Below Correctly Applied the *Rumery* Balancing Test.

1. A Balancing Test Is Appropriate To Determine If This Settlement Clause Is Void As Against Public Policy.

An agreement to settle a legal dispute is a contract, and its enforceability is governed by principles of

contract law. *See, e.g., United States* v. *ITT Continental Baking Co.* 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975); *Village of Kaktovik* v. *Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982). It is hornbook law that private parties cannot agree to provisions of a contract that violate public policy. *See, e.g., Northwest Airlines, Inc.* v. *Alaska Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir. 1965), *cert den.*, 383 U.S. 936 (1966). Yet here, the settlement contract on its face does just that. Thus, as this Court recognized in *Rumery*, a careful balancing test is necessary to evaluate settlement agreements that implicate public interests.[6] *Rumery*, 480 U.S. at 392-97.

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[6] The Court of Appeals wrestled with the issue of whether the *Rumery* balancing test, which only dealt with an agreement waiving a statutory right (*Rumery*, 480 U.S. at 392), is the appropriate test in a case where a contract purports to waive constitutional rights. (Petition Appendix, at A-17 to A-18.) The court found it did not need to decide that issue because the challenged provision is unenforceable even under the *Rumery* balancing test. *Ibid.*

If the Court of Appeals had addressed this issue, it might well have concluded that *Rumery* did not control. In *Rumery*, an individual waived his right to seek monetary damages for an alleged wrong by signing a "release-dismissal agreement." The agreement did not go beyond dismissal of the potential claims. For example, it did not purport to prevent the individual from running for mayor or chief of police of the city whose police force had allegedly violated his rights. Here, in contrast, by restricting respondent's right to candidacy, the challenged provision went far beyond a waiver of potential claims, and far beyond any legitimate government interest. For example, enforcing the challenged provision would not enable petitioner to better fulfill its educational function. Although the individual Governing Board members may disagree, the voters of the

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2. The Court of Appeals Properly Evaluated the Public Policies Against Enforcement.

The public policies that weigh against enforcing paragraph 9 are substantial. Although there are no known cases directly on point, there is significant authority for the proposition that contracts which tend to impair the integrity of public elections are void. As one author states:

> Agreements which tend to impair the integrity of public elections are contrary to public policy. The law, therefore, condemns as illegal, not only agreements to bribe a voter directly or indirectly, but also, all those which in any way tend to curtail a free exercise of the elective franchise, as, for example, a contract for a reward, contingent on success, to use one's influence to secure another's election to public office; . . .
>
> * * *
>
> It is to the interest of the state that all places of public trust be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence, the law annuls every contract for procuring the appointment or election of any person to an office, or for procuring his resignation from an office. All contracts tending to influence appointments to public offices

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school district obviously believed respondent could *improve* the school district's performance of its educational function. Thus, due to the constitutional nature of the interests involved, the Ninth Circuit would have been justified in applying a more stringent test to enforce this contract clause than was applied to the contract clause in *Rumery*.

> are unlawful and void, and this is the rule even though the promised payment therefor is not contingent on success.

17 C.J.S. §§ 217-218, pp. 1045-1047. Likewise, this Court has recognized that:

> No right is more precious in a free country than that of having a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Williams v. *Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).[7] Stated succinctly, *any* restriction on the right to vote freely for the candidate of one's choice strikes at the heart of representative government. *Reynolds* v. *Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).[8]

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[7] *See also*, section 29612 of the California Election Code:

> Any person who in any manner interferes with . . . the voters lawfully exercising their rights of voting at an election, as to prevent the election . . . from being fairly held and lawfully conducted is punishable by imprisonment in the state prison for 16 months or two or three years.

[8] *See also, Johnson* v. *Hamilton*, 15 Cal.3d 461, 471, 125 Cal.Rptr. 129, 541 P.2d 881 (1975):

> One disturbing phenomenon of the current political scene . . . is an apparent substantial increase in voter apathy. The erosion and decay caused by the acid of indifference, unconcern and lack of participation, if prolonged, may pose a danger to democratic institutions, far more subtle and invidious than any other. Such a danger suggests the wisdom of widening rather than narrowing the candidate options available to the public. The vigor of a democracy depends

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The Court of Appeals recognized the district court's error in treating Dr. Davies' constitutional right to hold public office as an ordinary chattel, one which could be bought or sold. The district court had stated: "In essence, Dr. Davies sold his constitutional right to the District for his share of $39,200, and is precluded from asserting it now."[9] (Interim Motion, exh. 7, p. 2, ll. 24-26.) This holding was clearly erroneous. There is no authority for the proposition that a person's right to hold public office can be bought or sold. It would indeed be ironic if, under the republican form of government, representatives could use tax revenues to pay off political opposition and thereby legally block the electorate from choosing its own candidate. As the Court of Appeals held in reversing the district court, "[t]o treat political rights as economic commodities corrupts the political process. . . . such agreements are particularly offensive where, as here, the

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> upon the continued infusion into the stream of public debate of the views and proposals of the many. These views and the political fortunes of those who as candidates for public office advance them will be accepted or rejected by the people whose common sense and good judgment may, indeed must, be trusted. For in the final analysis it is the people's business with which we are concerned.

[9] The district court apparently accepted petitioner's argument that it paid Dr. Davies not to run for office. According to the school district, one of the important terms of the settlement agreement was Dr. Davies' consent to forego seeking "office" with the school district, for which Dr. Davies (and his wife) "received the sum of $39,200 in exchange. . . . " (Petition, pp. 3-4.) The school district offers no explanation of why it insisted on a settlement agreement that *ipso facto* is a crime under California law. *See* Elec. C. § 29305 and Penal C. § 424.

parties authorizing the payment are elected officials and the recipient is a potential political opponent." (Petition Appendix, at A-22.)

This issue, the nature of the American form of government, illustrates the broader concerns that are impacted if private contracts can restrict the right to candidacy. A school district is a group of citizens who pool their resources to hire teachers and administrators to educate their children. To oversee this operation, the citizens elect from among themselves representatives who act as a school board. Thus, the school board is simply the voice of its collective citizenry – a way to avoid a plebiscite on every administrative question. Even if one assumes that the settlement agreement at issue here was properly signed on behalf of the citizens of the school district, the citizens withdrew any possible restriction by their votes for Dr. Davies in the election. Here, there was a plebiscite and Dr. Davies won. That is the essence of democracy.

The Court of Appeals recognized this, holding that the challenged provision called into question the constitutional right to run for elective office and the constitutional rights of the voters. The Court of Appeals had no difficulty in identifying these public interests as interests "of the highest order served by the preservation of the integrity of the ballot." (Petitioner's Appendix, at A-18.) Indeed, the importance of the public interest is aptly declared by section 29305 of the California Election Code, which states, in pertinent part, "A person shall not directly or through any other person advance, pay, solicit, or receive or cause to be paid or received any money or other valuable consideration . . . in order to induce a

person not to become or to withdraw as a candidate for public office."

Petitioner improperly tries to minimize these public interests by arguing that the challenged provision is enforceable because it does not involve a "general disqualification" from candidacy, and that it "applies only to one office." (Petition, p.16.) Petitioner suggests that the Court, respondent, and the voting public should be satisfied as long as respondent can run for some *other* office, in some *other* district, or as long as someone other than respondent, but with respondent's political and educational views, can be elected. This reasoning exposes petitioner's real motive behind its district court contempt action: The individual Governing Board members do not want respondent to serve on the Governing Board, and they believe they should have the right to substitute their judgment for the will of the voters.[10] The Court of Appeals recognized this motive, and properly characterized it as "pernicious." (Petition Appendix, at A-21.)

Petitioner also argues that the challenged provision is enforceable because it does not "place any burdens on any classification of persons." (Petition, p. 16.) In fact, the discriminatory classification here is of the most obvious and direct variety: It purports to single out and exclude a particular potential candidate from running for political office and it precludes the voters from electing him simply because he was once a party to a lawsuit involving petitioner.

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[10] This paternalistic model of government that the Governing Board implicitly promotes is often an indicia of societies less democratic than our own.

Finally, petitioner tries to avoid the real issue by noting that this Court has never recognized candidacy as a "fundamental right." That much is true. This Court has upheld numerous statutes and regulations that, to one degree or another, affect the ability of a given individual to run for office. (See cases cited at Petition Appendix, at A-18 to A-19.) However, as the Court of Appeals recognized, such statutes and regulations are ordinarily grounded in the state's important interest in holding fair, open and procedurally proper elections, a fundamental tenet of the democratic system. *Ibid*. Here, petitioner does not even suggest that the challenged provision is necessary to protect the state's interest in governing the mechanics of an election. Rather, the motive behind the provision appears either to be to insulate the incumbent Governing Board members from potential political competition or to "protect" the electorate from someone who has different political views than the current members of the Governing Board.

3. The Court of Appeals Properly Evaluated The Public Policies Favoring Enforcement.

Given the strong public policies involved, it was the school district's burden to identify countervailing public policies to justify enforcement of the challenged provision. Although the school district now focuses on a variety of public policy arguments, the school district placed much less significance on these issues below. The school district essentially argued to the district court that "a contract is a contract," and that should end the discussion. The school district maintained this posture on appeal. Thus, the record is devoid of any school district

brief or other pleading discussing at any length the public policies supposedly served by enforcing the challenged provision.

In oral argument before the Ninth Circuit, the school district remained unable or unwilling to enunciate what important public interest was promoted by forever barring a particular person from being a member of the school board (and concurrently forbidding voters from electing the representative of their choice). The oral argument transcript reveals that the court repeatedly asked the school district's counsel to address this question, but the school district offered little in response.

Now, in an ironic twist, the school district accuses the Ninth Circuit of "paying mere lip service" to relevant cases, of "ignoring" important public policies, of "not appreciating" important facts, and of making "sinister" assumptions. (Petition, pp. 9, 13, 15.) These strident attacks on the appellate court are unfair. Giving petitioner every benefit of the doubt, it at most urged two public policy considerations as the grounds to enforce the limitation on respondent's right to candidacy. First, petitioner argued that the general public policy favoring enforcement of private agreements and encouraging the settling of litigation justified enforcing paragraph 9 of the settlement agreement. (Petition Appendix, at A-20.) The Court of Appeals considered this interest, but found it insufficient to overcome the substantial public interests weighing against enforcement. As the court correctly noted, the interest in encouraging settlement is present in every case in which the validity of a settlement agreement is in question; there would be no point to the *Rumery* balancing test (or any other test) if all settlement

agreement provisions were blindly enforced. (Petition Appendix, at A-20.)

Petitioner's second asserted public policy interest urged in the court below was that its constituents would be harmed by respondent's participation in the operation of the school district. (Petition Appendix, at A-21.) The Court of Appeals properly rejected this assertion, noting that the voters are the best judges of their own interests. (Petition Appendix, at A-21 to A-22.) The court refused to allow the Governing Board members, or the outgoing incumbents, to substitute their judgment in the place of the voters' collective judgments, as expressed in the election results.[11] *Ibid.*

In its petition to this Honorable Court, petitioner raises for the first time the asserted public policy favoring settlement of litigation against public agencies.[12] Petitioner claims that although the Court of Appeals considered the public policy favoring settlement, the court nonetheless failed to recognize "the critical importance of

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[11] Ultimately, the course of events since the Ninth Circuit's decision seem to belie the school district's concerns. Dr. Davies took his seat on the Governing Board in February 1991. He has been part of weekly meetings since that time, and the school district appears to be functioning without incident.

[12] The petitioner asserts that the reason why there is a heightened public interest in settlements when the settling party is a public entity is that this avoids the inefficient dedication of public resources to protracted litigation. This argument is paradoxical in light of the apparently gross expenditures by this school district, which claims to be virtually bankrupt, in its seemingly obsessive preoccupation with keeping Dr. Davies off of the Governing Board.

settlement . . . [of] litigation against a public agency." (Petition, p. 10.) This argument is a red herring, whether stated as a general proposition applicable to all litigation or limited to litigation involving public agencies. The fact is, the settlement agreement between petitioner and respondent *did* settle all litigation between them, and that litigation will remain settled regardless of the outcome of this petition. In short, the settlement agreement has already accomplished the very goal which petitioner now asserts as the basis for precluding respondent from being a candidate for office.

Further, the elimination of portions of paragraph 9 from the settlement agreement has not in any way weakened other terms of the settlement.[13] The settlement agreement provided that if any term of the settlement agreement was found invalid or unenforceable, the unenforceable term would not impact any other terms of the settlement agreement. (Emergency Motion, Ex. 3, ¶ 18.) Thus, even with the elimination of the provision restricting Dr. Davies' right to candidacy, the other provisions of the settlement agreement have remained in force.[14]

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[13] The Ninth Circuit did not strike the entirety of paragraph 9 of the settlement agreement. The court only held that paragraph 9 was void to the extent that it restricted the right to seek and hold elective office. The Ninth Circuit did not in any way void the remainder of paragraph 9.

[14] The school district is presumably not arguing that the Court should enforce paragraph 9 of the settlement agreement, regardless of its effect, because to do otherwise would generically dissuade settlement of litigation. It would make little sense to argue that a court would be bound to foster settlements to the point of enforcing a contract that offends the Constitution.

Petitioner now also raises the public interest in encouraging obedience to court orders. (Petition, p. 9.) Petitioner's argument begs the essential question – whether there was any court order involved here. The provision restricting respondent's right to candidacy was contained in a document entitled "Stipulation for Compromise Settlement, Release and Order Thereon." The "Dismissal and Release and Order Thereon" acknowledged the fact of settlement and the release, and directed that the dismissal and release be entered in the official docket, but did not incorporate or order enforcement of the terms of the settlement. There is a split among the Courts of Appeals whether, in these circumstances, a breach of the settlement agreement constitutes a violation of a court order. *See generally, Hinsdale* v. *Farmers Nat'l. Bk. & Trust Co.*, 823 F.2d 993, 996 (6th Cir. 1987); *Fox* v. *Consolidated Rail Corp.*, 739 F.2d 929, 932 (3rd Cir. 1984), *cert den.*, 469 U.S. 1190 (1985). The Ninth Circuit apparently has yet to rule on this issue. Thus, petitioner misses the undecided legal issue when the petitioner assumes that there was a "court order" directing respondent not to run for office.[15]

Further, even if one assumes that Dr. Davies did violate a court order, petitioner's argument remains

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[15] Unlike petitioner, the Court of Appeals did not miss the legal issue of whether the dismissal order could form the basis for a judgment of contempt in view of the fact that the order did not direct the parties to abide by the agreement. However, based on its conclusion that the challenged provision of the settlement agreement was unenforceable in any event, the Court of Appeals found it unnecessary to decide this issue. (Petition Appendix, at A-9.)

unpersuasive. There is no evidence that Dr. Davies intentionally flaunted a court order. At most, he interpreted a single provision of a settlement agreement differently than the district court did. More importantly, the focus of the Ninth Circuit decision is not what Dr. Davies knew and intended, but rather on how the enforcement of paragraph 9 of the settlement agreement strips the electorate of its constitutional rights. Enforcement of paragraph 9 affects tens of thousands of people, not just Dr. and Mrs. Davies. 56,133 people voted for Dr. Davies. The court's order abridges their constitutional rights. Therefore, unlike in *Rumery*, the general citizenry loses substantial rights if the challenged provision is enforced.

As this entire discussion illustrates, petitioner's only real complaint with the Ninth Circuit is that petitioner did not prevail. Petitioner does not challenge the rules of law the Court of Appeals applied. Petitioner merely dislikes the result. Therefore, Petitioner shows no basis for this court to review the Court of Appeals' decision.[16]

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[16] The school district's petition for writ of certiorari strongly suggests that if this Court disagrees with the Court of Appeals' application of the *Rumery* balancing test, then this Court should affirm the district court's decision. This suggestion inaccurately assumes that the school district prevailed on all other issues. The Court of Appeals gave serious consideration to many of Dr. Davies' other legal arguments, including the argument that the school district either waived, or was estopped from asserting, the provisions of paragraph 9 of the settlement agreement. The Court of Appeals did *not* reject this argument, but rather held that:

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CONCLUSION

Petitioner's arguments show that the true disagreement between petitioner and respondent is a political one, which the voters have resolved. The Ninth Circuit's opinion upheld the right to candidacy and the right to vote, which outweighed any opposing public interests. Petitioner continues to pursue what is apparently a vendetta, but nonetheless has shown no reason why this

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> "[I]t is apparent that both the waiver inquiry and the estoppel inquiry require 'factually intensive' showings by Dr. Davies. Because the urgency of the motion in the court below, . . . the District Court neither conducted a hearing nor made factual findings with respect to either waiver or estoppel. As a result, we are unable to conclude on the basis of the current record that the District waived its right to enforce the agreement or that the District should be estopped. As a practical matter, the urgency of this appeal foreclosed the possibility of remanding the proceedings to the District Court for the development of a more complete factual record. Because we hold below that the challenged provision of the settlement agreement is unenforceable as against public policy, Dr. Davies is entitled to the relief he seeks regardless of whether he could have ultimately prevailed on a defense of waiver or estoppel. Thus a remand would in any event have served no purpose.

(Petition Appendix, at A-14 to A-15.) (citations omitted) As this portion of the Court of Appeals' decision reveals, if this Court disagrees with the Court of Appeals' application of *Rumery*, that would still leave open other persuasive reasons for affirming the Ninth Circuit's decision, or remanding this matter for further factual determinations.

Court should reach a different result than the Ninth Circuit. Therefore, the petition should be denied and the Court should award respondent all allowable attorneys' fees and costs.

Respectfully submitted,

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